UNITED OVERSEAS BANK (M) BHD

v.

WONG TIANG & ANOR

HIGH COURT MALAYA, MELAKA
KN SEGARA J
[CIVIL SUIT NO: 22-8-1999]
14 NOVEMBER 2000

CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether established - Rules of the High Court 1980, O. 14*

CONTRACT: *Repudiation - Acceptance of - Whether contract treated as subsisting*

The plaintiff bank granted certain banking facilities to the first and second defendants subject to the terms and conditions contained in the plaintiff's letter dated 26 January 1995. The defendants had breached the terms contained in the said letter in failing to pay the monthly installments promptly on the fixed loan on the due date and failing to pay the bankers acceptance on the maturity dates.

The defendants failed to comply with the notices of demand dated 28 May 1998 and 7 July 1998 sent by the plaintiff's solicitors. The plaintiff then filed a writ and a statement of claim dated 13 January 1999.

By a summons-in-chambers dated 17 April 1999, the plaintiff filed an application for summary judgment under O. 14 of the Rules of the High Court 1980 ('RHC'). The senior assistant registrar refused the application on the ground that there was a triable issue in that there were certain correspondences between the plaintiff and the defendants which indicated that the contract had not been repudiated by the bank, or alternatively, even if there was a repudiation and termination by the bank, the response by the defendants clearly pointed to a refusal to accept the repudiation and termination.

The issue for consideration was whether there were triable issues.

Held:

[1] When a party repudiates a contract, the other party can either accept such repudiation or refuse to accept it and treat the contract as still subsisting but sue the other party who is in breach of the agreement.

[1a] An overdraft is repayable on demand and a bankers acceptance is due and payable on the maturity date. Generally, failure to make monthly installments on a term loan facility promptly or at all, for any particular month, renders the whole balance outstanding due and payable. The correspondences therefore between the plaintiff and the defendants did not disclose any form of repudiation by the plaintiff.

[2] The plaintiff's case was plain and obvious and there were no triable issues of fact or law to warrant the denial of summary judgment under O. 14 of the RHC.

[Appeal allowed.]

Case(s) referred to:
Ganam Rajamany v. Somoo Sinnah [1984] 2 CLJ 268 ***(foll)***

Legislation referred to:
Rules of High Court 1980, O. 14

For the defendants - Wong Nai Chee; M/s SK Khoo & Tan Tian Tiok
For the plaintiff - TK Kee; M/s Chee Siah Le Kee & Partners

Reported by Mariette Peters-Goh

JUDGMENT

KN Segara J:

The plaintiff bank granted banking facilities to the 1st and 2nd defendants trading as Syarikat Perusahaan Siong Hup as follows:

(a) Overdraft facility up to the limit of RM500,000;

(b) Fixed Loan of RM243,000;

(c) Bankers Acceptance up to the limit of RM800,000. (including Bank Guarantee);

subject to the terms and conditions contained in the plaintiff's letter of offer dated 26 January 1995. In breach of the terms contained in the said letter, the defendants utilised the overdraft facilities in excess of the limit, failed to pay the monthly instalments promptly on the fixed loan on the due date and failed to pay the bankers acceptance on the maturity dates. Despite notices of demand dated 28 May 1998 and 7 July 1998 sent by the plaintiff's solicitors, the defendants failed to pay the amount claimed therein or any part thereof.

The plaintiff bank filed a writ and statement of claim dated 13 January 1999 against the defendants for the sum of RM1,386,043.82 due as at 1 September 1998 on the banking facilities as follows (see encl. 1 para. 13 of statement of claim):

(i) kemudahan pinjaman overdraf sebanyak RM568,581.85 bersama dengan faedah yang dikenakan pada 14.0% setahun (2% setahun melebihi kadar pinjaman asas setakat 1.9.1998 adalah 12.0% setahun) pada kiraan bulanan mulai dari 2.9.1998 sehingga 30.9.1998 dan seterusnya kadar faedah mulai dari 1.10.1998 adalah 2% setahun melebihi kadar pinjaman asas pada kiraan bulanan sehingga ke tarikh penyelesaian penuh;

(ii) kemudahan pinjaman tetap sebanyak RM 167,122.66 bersama dengan faedah yang dikenakan pada kadar 14.0% setahun (2% setahun melebihi kadar pinjaman asas setakat 1.9.98 adalah 12.0% setahun) pada kiraan bulanan mulai dari 2.9.1998 sehingga 30.9.1998 dan seterusnya kadar faedah mulai dari 1.10.1998 adalah 2% setahun melebihi kadar pinjaman asas pada kiraan bulanan sehingga ke tarikh penyelesaian penuh;

(iii) kemudahan penerimaan jurubank sebanyak RM650,339.31 bersama dengan faedah yang dikenakan pada kadar 2.0% setahun melebihi kadar pinjaman asas (kadar pinjaman asas setakat 1.9.1998 adalah 12% setahun) mulai dari 2.9.1998 sehingga 30.9.1998 dan kadar faedah mulai dari 1.10.1998 adalah 2.0% setahun melebihi kadar pinjaman asas sehingga ke tarikh penyelesaian penuh.

By summons-in-chambers dated 27 April 1999 (encl. 6), the plaintiff filed an application for summary judgment under O. 14 Rules of High Court 1980. The learned senior assistant registrar refused the plaintiff's application for summary judgment on the ground there was a triable issue with respect to a notice of demand and termination of banking facilities dated 2 January 1998, not referred to by the plaintiff in the statement of claim, but raised by the defendants in the affidavit in reply (encl. 7) to plaintiffs O. 14 application, as exh. WT1.

For purposes of the O. 14 application the plaintiffs filed two affidavits, dated 27 April 1999 and 15 September 1999, affirmed by Siow Chat Ming, the branch bank manager (encl. 5 and 11). The defendants filed only one affidavit to oppose the plaintiffs application, namely, the affidavit of Wong Tiang dated 1 June 1999 (encl. 7).

The letter which purportedly gives rise to a triable issue is exhibited as WT1 by the defendants. The material parts of the letter reads as follows:

Date: 02 January 1998

Syarikat Perusahaan Siong Hup
...

Subject: **Your Banking Faciliies With Us**

We refer to the recent review of your facilities with us and regret to advice that our Management has decided to terminate your existing facilities with us with immediate effect.

Therefore, you are hereby requested to fully settle the Overdraft (OD) facility outstanding soonest possible and to fully settle the bills (BA) outstanding on the respective BA outstanding on the respective BA maturity dates. Please note the outstanding as at 26.12.97 was:

...

...

Please be advised that meanwhile, no further drawdown of the facilities is allowed and the facilities limit is cancelled with immediate effect.

...
... Please let us have your proposed repayment schedule on OD and BG outstanding within 7 days from date hereof.

sgd.

...

It is very obvious from exh. WT1 that the bank has **reviewed** the defendants' banking facilities and has decided to terminate the facilities with immediate effect, in the exercise of its prerogative to do so. The bank demanded that the overdraft be paid in full and the bankers acceptance be settled on the respective maturity dates. The defendants' response to the bank is exh. WT6, in encl. 7. It is a letter dated 10 February 1998. The material parts of the letter reads as follows:

RE : BANKING FACILITIES

1 refer to your letter dated 2nd January 1998 and 19th January 1998 and am completely shocked and disappointed with the contents thereof and your action in withdrawing the following facilities immediately:

Facility	**Outstanding**
OD	RM491K
BA	RM605K
BG	RM35K

Your action is not justified and can only be interpreted by me as not being *bona fide* for the following reasons:

1. ...
2. ...
3. ...
4. ...
5. ...
6. ...

In view of the general economic situation in the country brought about by the current depreciation of the Ringgit, the government has advised financial institutions in general to exercise restraint in dealing with their Clients and for this reason (...), I hope you will also bear that in mind in dealing with my case.

Finally, I feel that you must revise the drastic steps which you have chosen to take against me and to restore all the facilities at your earliest convenience. I am compelled to inform you ...

sgd.
Wong Tiang
Managing Partner

The plaintiff replied to the defendants by letter dated 14 March 1998, which is exhibited as UOBB 13, in encl. 11. The relevant parts of the letter are as follows:

To:

Syarikat Perusahaan Siong Hup
...

Subject: **Your Banking Facilities With Us**

We refer to the letter dated 10 February 1998 from WT Industries Sdn Bhd to us referring to the banking facilities granted by us to yourselves.

Please be advised that the banking facilities made available to yourselves pursuant to our letter of offer dated 26 January 1995 to you was on the basis that the availability and limits of the said facilities are subject to our review from time to time at our sole discretion.

Pursuant to our recent review of your account, our Bank had exercised such discretion and terminated the facilities *vide* our letter to you dated 2 January 1998.

a Following our said termination, we had not been unreasonable in that we had requested that the overdraft facility (OD Facility) be settled soonest possible and that the bills outstanding (BAs) be repaid on maturity. In this connection, we had in our letters to you dated 2 January 1998, 6 February 1998 and 14 February 1998 requested that you propose an acceptable repayment schedule which we note you had not responded to. We had also in our aforesaid letters *b* to you and our letters dated 13 January 1998 and 19 January 1998 reminded you of the overdue bills which must be settled immediately.

We now wish to advise that as at the date hereof, the outstanding amount in respect of the following facilities are as follows:

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OD Facility	-	RM510,063.31
Overdue BAs	-	RM445,000.00

Please also note that:-

1. the maturity date for BA No. 252BA973211 amounting to RM160,000.00 falls *d* on the 10 April, 1998. Kindly settle the amount due under the said BA on the said maturity date; and

2. the total sum payable by the Bank under bank guarantee(s) issued under the BG Facility amounts to RM35,000.00. You are required to pay to us all sums to be paid by us pursuant to the bank guarantee(s) upon our payment *e* thereof.

In the meantime, interest will continue to accrue on sums due and outstanding at the rate of:

(i) ...
(ii) ...
f (iii) ...

... until full settlement thereof.

Kindly effect payment in respect of all sums due under the OD Facility and the Overdue BA on the following repayment schedule:

g

i) Payment of RM299,000.00 together with interest and other charges accrued thereon to fully settle the 2 BAs due on 9 January 1998 and 6 February 1998 on or before the 31 March 1998.

ii) Payment of the sum of RM306,000.00 together with interest and other *h* charges accrued thereon to fully settle the 2 BAs due on 13 March 1998 and 10 April 1998 on or before the 30 April 1998.

iii) OD is to be repaid by monthly instalments of RM100,000.00 each on the last day of each month beginning from 31 May 1998 until full settlement.

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The above repayment schedule is without prejudice to our right to commence legal proceedings to recover all sums due and payable by yourselves to us at any time in the event any of the above terms and conditions are not adhered to by yourselves.

sgd.	sgd.
Branch Manager	Assistant Manager

From the three letters, exhs. WT1, WT6 and UOBB 13 which I have refered to above read together with the bank's letter of offer dated 26 January 1995 for the banking facilities (exh. UOBB 2 in encl. 5) it is manifestly clear that the letter of 2 January 1998 from the bank (exh. WT1) cannot be deemed a repudiation of the contract by the bank. Even if said letter is treated as a repudiation and termination, the response by the defendants, *via* their letter dated 10 February 1998 (exh. WT6), clearly points to a refusal to accept the repudiation and termination. In the circumstances, the contract between the bank and the defendants continued to exist, notwithstanding the bank's letter of 2 January 1998. Therefore, the defendants are bound to use the overdraft facility within limit, pay the bankers acceptances when due and observe all the obligations of the parties under their contract for the banking facilities. In this case, there is no dispute there has been a failure by the defendants to pay the bankers acceptances on the due dates and utilise the overdraft within limit. Therefore, there was a breach of the contract and the plaintiff is entitled to terminate the facilities and claim for all outstanding sums. Prior to filing the writ, the plaintiff's solicitors sent out two notices of demand 28 May 1998 and 7 July 1998 (exhs. UOBB 8 and UOBB 9, in encl. 5). The notice of demand related to the four banking facilities incorporated in one contract and reflected the state of indebtedness of the defendants current at the date of the respective notice. However, when the writ and statement of claim was filed, the suit was in respect of the indebtedness of the defendants as at 1 September 1998 (see para. 13 encl. 1). The notices of demand (exhs. UOBB 8 and UOBB 9) had incorporated the contingent claim on the facility for the bankers guarantee. Obviously, as at 1 September 1998, the contingent liability had ceased and the plaintiff was certain no claim would be made by any party to whom such a guarantee had been issued, at the defendants' request, and there were no further contingent liabilities under this facility. The certificate of indebtedness as to the total outstanding as at 1 September refers only to the overdraft facility, team loan facility and bankers acceptance (exh. UOBB 10, encl. 5). The sums set out in para. 13 of the statement of claim for the respective facilities corresponds with that in the certificate of indebtedness, exh. UOBB 10. The defendants have not adduced any evidence to show

there is a manifest error on the face of the certificate or fraud. In the circumstances, the certificate should be accepted as conclusive as to the accuracy and the plaintiff should not be denied summary judgment and called upon to prove the quantum of the debt claimed, at a trial, in accordance with the requirements of the Evidence Act 1950. The defendants' counsel submitted that the fixed loan facility was not in arrears and the instalment of RM3,797 was paid every month. He referred to current account statements of defendants with another bank indicating the monthly withdrawal of RM3,797 by the defendants for the period 15 February 1998 to 15 July 1998 (exh. WT4 in encl. 7). There were neither statements of account exhibited to indicate withdrawals of a similar sum in the months of July, August and September 1998 nor did the defendants affirm in the affidavit that they had paid the monthly instalment on the fixed term loan facility for the months of July, August and September 1998. A perusal of the defendants' statement of account for the period 1 January to 31 December 1998 with the plaintiff (exh. UOBB 6, in encl. 5) shows the monthly instalment of RM3,797 was never paid at all after the month of June 1998 and this is not disputed by the defendants. The argument that the defendants are not obliged to make any payments because the plaintiff had wrongly and unlawfully terminated the banking facilities by its letter dated 2 January 1998 (exh. WT1), thereby discharging the defendants from performing their obligations, is fallacious and without legal merits.

In *Ganam d/p Rajamany v. Somoo s/o Sinnah* [1984] 2 CLJ 268 at p. 273 the Federal Court held:

> A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called *"brutum fulman"* that is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent ... (per Lord Wright in *Edridge v Sathna*).

When a party repudiates a contract, the other party can either accept such repudiation or refuse to accept it and treat the contaract as still subsisting but sue the other party who is in breach of the agreement. On the affidavit evidence before me, it is my finding that there is no repudiation of the contract by the plaintiff flowing from the letter dated 2 January 1998 (exh. WT1). An overdraft is repayable on demand. A bankers acceptance is due and payable on the maturity date. Generally, failure to make the monthly instalment on a term loan facility promptly, or at all, for any particular

month, renders the whole balance outstanding due and payable. Upon a careful examination of the affidavit evidence, the plaintiff's case is plain and obvious. There are no triable issues of fact or law to warrant the denial of summary judgment under O. 14 Rules of High Court 1980. This appeal is allowed with cost. Plaintiff allowed to enter final judgment for the sum as claimed.